No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Petitioners,

v.

STATE OF HAWAII, ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

The President's Proclamation No. 9645, 82 Fed. Reg. 45, 161 (Sept. 27, 2017), suspends the entry of certain categories of foreign nationals from eight countries, including six countries that are majority-Muslim. Respondents allege, and the Fourth Circuit in *International Refugee Assistance Project* v. *Trump* ("*IRAP*"), __ F.3d ____, 2018 WL 894413 (4th Cir. Feb. 15, 2018), found, that the Proclamation impermissibly targets Muslims. The question presented is:

Whether the Proclamation's alleged religious targeting should in the first instance be evaluated under the Establishment Clause or the Free Exercise Clause.

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Sanford Cobb, *The Rise of Religious Liberty in America: A History* (1970) 12

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Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) ..... *passim*

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths. Becket has appeared before this Court as counsel in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Becket has long sought to protect minority groups from religious targeting by the government. Accordingly, Becket has appeared as counsel or amicus in many cases in which the government has singled out a particular religious group or practice for worse treatment than its secular analogues. See, *e.g.*, *Holt*, 135 S. Ct. 853 (counsel for Muslim petitioner seeking to grow a short religious beard where prison system allowed beards for nonreligious reasons); *Singh* v. *Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016) (counsel for Sikh plaintiffs successfully challenging refusal to let Sikhs serve in the military while observing religious requirement to wear beard and turban); *Merced* v. *Kasson*, 577 F.3d 578 (5th Cir. 2009) (counsel for Santería priest challenging municipal ban on religious animal sacrifice that allowed killings for secular reasons); Petition for Writ of Certiorari, *Stormans, Inc.* v. *Wiesman*, No. 15-862 (U.S. Jan. 4, 2016)

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[1] No party's counsel authored any part of this brief. No person other than *Amicus* contributed money intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

(counsel for Christian pharmacists challenging state law prohibiting conscientious refusals to provide certain drugs but allowing refusals for business and other secular reasons); *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, 709 F.3d 487 (5th Cir. 2013) (counsel for observant Jewish prisoner seeking kosher diet).

Becket has also long argued that the Establishment Clause should not be used to pit church and state against one another, and has in particular opposed application of the *Lemon* test. See, *e.g.*, *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (challenge to Pledge of Allegiance); *Am. Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227 (2d Cir. 2014) (challenge to exhibition of "Ground Zero Cross" in museum); *New Doe Child #1* v. *United States*, No. 16-4440 (8th Cir. filed Dec. 13, 2016) (challenge to "In God We Trust" on currency).

Based on its expertise in this area, and in keeping with understandings of the Free Exercise and Establishment Clauses it has long advocated in a variety of contexts, Becket files this brief in favor of neither party on the merits. Rather, as a friend of the Court and of the First Amendment, Becket offers something that has been missing in the litigation thus far: a proper understanding of the complementary roles of the Establishment and Free Exercise Clauses and how they should apply in a case of alleged religious targeting.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The stakes in this case could not be much higher. On one side, there are claims that the government

has targeted a particular religious group for disfavor, something repugnant to our constitutional traditions. Singling out a particular religious group for punishment or mistreatment is always constitutionally suspect and, in fact, presumptively unconstitutional. Only in rare circumstances can the government hope to survive strict scrutiny and justify religious targeting.

On the other side, the government offers weighty national security interests and the preservation of American lives, in the context of a slew of terrorist incidents around the world that are claimed to be religiously motivated. These are, by any measure, interests of the highest order.

But the stakes here are higher still because of those Americans who are *not* before the Court. That is because this litigation will set the standard for how to balance these different interests for the many religious liberty cases that will arise in the future. What law this Court applies, how this Court applies that law, and how it balances the various interests at stake are questions that transcend the particular personalities and issues in this case and go instead to the very heart of the constitutional order.

In cases challenging the constitutionality of the Proclamation and its predecessor Executive Orders, "EO-1" and "EO-2," see *Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2083 (2017), the lower courts and the plaintiffs have failed to address these questions. Instead, each lower court that has held for the plaintiffs on the constitutional issue has used the wrong Religion Clause and the wrong legal test to root out claimed religious targeting. The courts have used the Establishment Clause (which aims to pre-

vent government involvement in religion) rather than the Free Exercise Clause (which protects religious individuals and groups from burdens on their religious beliefs and exercise). But as this Court indicated more than two decades ago in *Lukumi*, it is typically only efforts to control or "to benefit religion or particular religions" that can establish religion in violation of the Establishment Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). By contrast, laws that "discriminate[] against some or all religious beliefs or * * * conduct" should be analyzed in the first instance under the Free Exercise Clause. *Ibid.*; see also *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' * * * ." (quoting *Lukumi*, 508 U.S. at 542)). Indeed, Petitioners' and Respondents' repeated citations to *Lukumi*, even though it is a Free Exercise case, demonstrate that at least subconsciously the parties realize they are approaching this case the wrong way.

To date, none of the lower courts in cases challenging the Proclamation or its predecessor Executive Orders has been asked to analyze the question of religious targeting under the clause of the Constitution that most naturally prevents it: the Free Exercise Clause. Yet it is Free Exercise doctrine, not Establishment Clause doctrine, that gives courts the tools needed to determine whether the Proclamation is a benign national security measure or an invidious "Muslim ban." And the parties and the Fourth Circuit have compounded the error of choosing the wrong Clause by applying the wrong test, using *Lem-*

on's ahistorical "purpose" analysis rather than the historically grounded *Town of Greece* approach.

The lower courts' approach to analyzing the Proclamation's constitutionality, if adopted by this Court, would come at significant cost. The lower courts' use of the wrong Clause and the wrong test have led them to decide important questions of First Amendment rights and national security by relying on inferences about the state of mind of a single government official. Worse still, because the lower courts have used the Establishment Clause, they have invalidated the Proclamation without weighing the government's claimed interest in protecting national security.

That is a bad outcome for considering the government's interests, for considering religious interests, and for reducing church-state conflict. The national security interests have not been considered at all. And avoiding a formal balancing test ultimately harms religious liberty interests because it puts too much pressure on courts to balance by other, unstated means. The danger of informal balancing is all the greater here because the *Lemon* test depends so heavily on the state of mind of individual officials who will eventually no longer be in office. By contrast, under the Free Exercise Clause, courts can balance enduring interests through the time-tested affirmative defense of strict scrutiny. Moreover, courts can design remedies that are tailored to the specific plaintiffs before the Court, thus reducing the scope of church-state conflict.

Under a Free Exercise analysis, this Court's unanimous decision in *Lukumi* provides a roadmap

for resolving this case. There, the Court analyzed a law that was deliberately crafted to target one particular religious minority while allowing similar conduct for nonreligious purposes. That is the gravamen of the complaint here. Under *Lukumi*, there are many ways in which a plaintiff might show that the Proclamation is either not neutral or not generally applicable, and therefore merits strict scrutiny review.

But instead of looking to *Lukumi*, the lower courts and plaintiffs have chosen to follow the *Lemon* will-o'-the-wisp, much to the detriment of both the resolution of this litigation and the constitutional order. Because the Proclamation's constitutionality under the First Amendment has not properly been litigated below, the case should be remanded, and Respondents should be given the chance to litigate their thus far undeveloped Free Exercise claim. See Third Amended Compl. ¶¶ 147-51, *Hawaii* v. *Trump*, No. 1:17-cv-00050, ECF No. 381 (D. Haw. Oct. 15, 2017) (alleging that the Proclamation violates the Free Exercise Clause).

ARGUMENT

I. The lower courts have incorrectly applied the Establishment Clause.

The Fourth Circuit in *IRAP*, echoing its own and other lower courts' earlier decisions holding unconstitutional EO-1 and EO-2, relied solely on the purpose prong of the *Lemon* test to enter a nationwide injunction against the Proclamation. But *Lemon* is a poor test for determining whether an act of government establishes religion. Under the appropriate historical

analysis, the Proclamation does not establish religion.[2]

A. *Lemon* provides a poor foundation for deciding Establishment Clause claims.

To say that *Lemon*'s three-pronged test has a troubled past is putting it mildly. In recent cases, the Court has treated the *Lemon* factors, at best, as "no more than helpful signposts." *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality) (citation omitted). More often—and without exception in the last

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[2] *Amicus* addresses the merits of Respondents' Establishment Clause claims, not whether Respondents or the *IRAP* plaintiffs have standing to raise them. *Amicus* does note, however, that in finding standing in *IRAP*, the Fourth Circuit relied in part on its own precedent from religious display cases, in which it has held that merely having "personal contact" with an allegedly offensive religious display—that is, seeing the display and feeling offended or stigmatized by it—suffices to create standing. *IRAP*, 2018 WL 894413, at *8-9 (citing *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997)). This precedent conflicts with this Court's decision in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), which flatly rejected the notion that merely suffering "psychological consequence * * * produced by observation of conduct with which one disagrees" gives a plaintiff standing to raise an Establishment Clause claim. *Id.* at 485-86. In light of *Valley Forge*, stigmatization can create standing in the Establishment Clause context only under the same circumstances in which it creates standing under the Equal Protection Clause: when the plaintiff has been "personally denied equal treatment by the challenged [government] conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (citation and quotation omitted); see also *Valley Forge*, 454 U.S. at 484 (no "sliding scale" for standing depending on which constitutional right invoked).

decade—it has not applied *Lemon* at all. See *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014) (not applying *Lemon*); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

The lower courts, however, continue to feel obligated—or empowered—to apply *Lemon* in the absence of clear doctrinal guidance on the Establishment Clause.

Lower court judges have criticized, and scholars have expressed frustration at, the inconsistent application invited by the subjective factors in *Lemon*. See, *e.g.*, *Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 869-72 (7th Cir. 2012) (Easterbrook, J., dissenting from *en banc* decision) (calling *Lemon* "hopelessly open-ended"); *Card* v. *City of Everett*, 520 F.3d 1009, 1023–24 (9th Cir. 2008) (Fernandez, J., concurring) ("The still stalking *Lemon* test and the other tests and factors * * * are so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable."); Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 Colum. L. Rev. 1373, 1380-88 (1981) (*Lemon* an "important source of confusion"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118-20 (1992) ("the Court has contrived a formula for interpreting the Establishment Clause that contains inconsistencies within a single test").

One of *Lemon*'s many problems, as highlighted by this case, is that it wrongly places the focus on the subjective intent of the government official to determine whether an action is an establishment of religion. State of mind can be difficult to discern, and

perhaps more so when it comes to matters of metaphysics. Worse still, the focus on this question as the first prong of a disjunctive test leads to an overemphasis on extra-textual evidence of what a lawmaker's actions may mean, despite the Court's admonition to avoid "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty.* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005).

In *IRAP*, the Fourth Circuit's application of the *Lemon* test resulted in an issue of national security and constitutional law turning in part on judicial interpretation of tweets and television interviews, 2018 WL 894413, at *1, *15, and an assessment of how long the "taint" of those statements might last. *Id.* at *16. Absent from the analysis was any serious consideration of the historical elements of an establishment.

B. All nine Justices in *Town of Greece* employed a history-based approach instead of *Lemon*.

This Court's most recent Establishment Clause precedent, *Town of Greece*, sets forth a far better mode of analysis—one that displaces *Lemon* and provides the objective criteria lower courts need to evaluate whether a challenged government practice establishes a religion. *Town of Greece* rejected the idea that the allowance of legislative prayer in *Marsh* v. *Chambers*, 463 U.S. 783, 796 (1983), "carv[es] out an exception" to general Establishment Clause jurisprudence. *Town of Greece*, 134 S. Ct. at 1818. Instead, the Establishment Clause "must" be interpreted "'by reference to historical practices and understandings.'" *Id.* at 1819 (quoting *Cty. of Allegheny* v. *ACLU*

Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989). Importantly, this focus on history was the approach also adopted by the principal dissent in *Town of Greece*. See *id.* at 1845-51 (Kagan, J., dissenting) (citing historical practice).

Town of Greece starts from the premise that an "establishment of religion" had a defined meaning at the time of the founding, and that history is an important guide to interpreting what that means to courts today. Historical analysis has long played an important role in Establishment Clause doctrine. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 181-87 (summarizing historical view of Establishment Clause); *Van Orden*, 545 U.S. at 686 (citing history); *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8-16 (1947) (same). But before *Town of Greece*, courts often failed to begin with a logically prior question: what is an establishment of religion? See *Town of Greece*, 134 S. Ct. at 1838 (Thomas, J., concurring) (considering "*what constituted an establishment*" at the time of the founding); see also Eric Rassbach, Town of Greece v. Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 Cato S. Ct. Rev. 71 (2014). When courts objectively assess whether modern government actions mirror the establishments the Founders rejected, Establishment Clause jurisprudence will be clearer and more predictable.

Six features characterized founding-era establishments. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). Judge Kelly and Chief Judge Tymkovich employed those features in their dissenting opinion

in *Felix* v. *City of Bloomfield*, 847 F.3d 1214 (10th Cir. 2017). They are: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Id.* at 1216 (Kelly, J., dissenting) (quoting McConnell, 44 Wm. & Mary L. Rev. at 2131). These categories should have been applied in this case and would have led to the conclusion that the Proclamation does not constitute an establishment of religion.

C. The Proclamation does not violate the Establishment Clause.

The Proclamation displays none of the six characteristics of a historical establishment.

1. The Proclamation does not create state control over doctrine, governance, and personnel of a church.

At the time of the founding, state control over the institutional church manifested itself in the control of religious doctrine and the appointment and removal of religious officials. McConnell, 44 Wm. & Mary L. Rev. at 2132; see also Thomas Berg, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011). Thus, colonial establishments typically included government appointment and removal of ministers, rendering religious groups "subservient" to their state masters. McConnell, 44 Wm. & Mary L. Rev. at 2140-41; see also *Hosanna-Tabor*, 565 U.S at 182-83 (describing government control over ministe-

rial appointments during the colonial period). This control over who was appointed a minister was an element of establishment the Founders sought to avoid. *Hosanna-Tabor*, 565 U.S. at 183-84 (citing 1 Annals of Congress 730-31 (1789)).

The Proclamation does not seek to control religious doctrine. No church is compelled by the Proclamation to adopt or reject religious doctrine, clergy, or governance.

2. The Proclamation does not compel church attendance.

Anglican colonies like Virginia followed England's example by fining those who failed to attend Church of England worship services. McConnell, 44 Wm. & Mary L. Rev. at 2144; George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* 412 (1947). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 512-14 (1970); Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in * * * religion").

The Proclamation has nothing to do with church attendance, compulsory or otherwise.

3. The Proclamation provides no financial support to any church.

At the time of the founding, public financial support took many forms—from compulsory tithing, to direct grants from the public treasury, to specific taxes, to land grants. McConnell, 44 Wm. & Mary L. Rev. at 2147. Land grants, the most significant form

of public support, provided not only land for churches and parsonages, but also income-producing land that ministers used to supplement their income. *Id.* at 2148.

The Proclamation does not financially support any church.

4. The Proclamation does not prohibit worship.

As part of their efforts to prop up the state churches, colonies sometimes prohibited worship by adherents of non-state religions. Some colonial establishments were more tolerant than others, and those that were less tolerant singled out particular groups to banish.[3] McConnell, 44 Wm. & Mary L. Rev. at 2131, 2161. Some establishments tolerated "orthodox" dissents from the official state religion, some singled out particularly vexatious individual denominations (like Quakers) for persecution, and some outlawed any form of worship outside the strict doctrine of the state church. Virginia, for example, imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm," and horse-whipped others for the same offense. *Id.* at 2119, 2166. Several states banned Catholic churches altogether. *Id.* at 2166. This element of an establishment took the form of control of religious belief and worship by the established church.

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[3] The Church of England is an example of a modern "tolerant" establishment, where the church is given official status as the state religion, but dissenting worship is not prohibited. Saudi Arabia is an example of an "intolerant" establishment.

The Proclamation does not encourage or discourage worship.

5. The Proclamation does not cede important public functions to church institutions.

A fifth element of establishment is government assignment of important civil functions to church authorities. At the founding, states used religious officials and entities for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. McConnell, 44 Wm. & Mary L. Rev. at 2169-76. Thus, at certain points in state history, New York recognized only those teachers who were licensed by a church; Virginia ministers were tasked with keeping vital statistics; and South Carolina recognized only those marriages performed in an Anglican church. *Id.* at 2173, 2175, 2177.

The Proclamation gives no important civil functions to any church. No religious group has the authority to determine immigration policy or entry criteria.

6. The Proclamation does not restrict political participation to members of any church.

The final feature of an establishment is the restriction of political participation based on church affiliation or the lack thereof. At the time of the founding, England allowed only communing Anglicans to hold public office and vote; many colonies and then states imposed comparable measures. McConnell, 44 Wm. & Mary L. Rev. at 2176-77 (describing Test and Corporation Acts and their analogues). Although re-

ligious tests were prohibited at the federal level by the Religious Test Clause of Article VI, *id.* at 2178, many such tests persisted in the states. Maryland's version of religious disqualification lasted until 1961. See *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

The Proclamation does not impose any religious test for political participation. Respondents present no claim that the Proclamation violates the ban on religious tests for office, limits voting rights, or interferes with other aspects of political participation.

II. Respondents' religious targeting claim should be evaluated under the Free Exercise Clause instead.

That Respondents' Establishment Clause claim fails does not mean that the religious targeting they allege is without a First Amendment remedy; it means only that they have invoked the wrong part of the Religion Clauses. Because the two Religion Clauses "form a single grammatical unit and reflect a common history" they ought to be "interpreted complementarily." Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 695 (1992). At bottom, both the parties and the lower courts struggled to understand how the Religion Clauses address the problem of religious targeting. But "[s]ince consideration of these issues is essential to analysis of the [lower courts'] decision," and "essential to the correct disposition of the other issues in the case" the question of the Free Exercise Clause's scope of application is "fairly included" in the fourth question presented. *Missouri* v. *Jenkins*, 515 U.S. 70, 84-85 (1995) (citation omitted); S. Ct. R. 14.1(a).

And the Court has good reason to reach the question. Should the Court reverse the Ninth Circuit's decision here, the plaintiffs will still have Free Exercise and other claims against the Proclamation that will have to be considered by the lower courts in due course. Fully explaining how the Religion Clauses deal with the problem of religious targeting, including explaining how the Free Exercise Clause ought to be applied on remand, will thus preserve both this Court's resources and the lower courts'.[4]

A. Targeting of a particular religious group has historically been viewed as a Free Exercise, not an Establishment Clause, problem.

The core of Respondents' theory is that the Proclamation is unconstitutional because it "singl[es] out" members of one particular religion—Muslims—"for disfavored treatment." Second Am. Compl. ¶ 377, *Int'l Refugee Assistance Project* v. *Trump*, No. 8:17-cv-361, ECF No. 203 (D. Md. Oct. 5, 2017); see also Third Am. Compl. ¶¶ 142-46, *Hawaii* v. *Trump*, No. 1:17-cv-00050, ECF No. 381 (D. Haw. Oct. 15, 2017). That claim sounds in free exercise, not establishment, both historically and today.

To be sure, the historical establishments prohibited by the Establishment Clause sometimes included

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[4] By contrast, the Court cannot reach Respondents' cognate statutory free exercise claim under the Religious Freedom Restoration Act, because determining how the Religion Clauses deal with religious targeting does not require or involve consideration of federal civil rights statutes.

efforts to suppress minority faiths. Virginia, for instance, banned Quakers from immigrating and prosecuted and imprisoned Baptist preachers. McConnell, 44 Wm. & Mary L. Rev. at 2163, 2165-66. And Massachusetts Bay adopted an Act Against Heresy, which banished from the colony any person who denied the immortality of the soul, resurrection, sin in the regenerate, the need of repentance, redemption or justification through Christ, the morality of the Fourth Commandment, or infant baptism. *Id.* at 2161.

But these efforts to exclude and suppress dissent were *in addition to* laws affirmatively promoting or controlling the established church; they were a way to buttress the establishment but they did not constitute the establishment itself. McConnell, 44 Wm. & Mary L. Rev at 2120, 2127-31 (explaining that establishments could be "tolerant or intolerant," with the difference being the extent to which they persecuted dissenters); see also *Torcaso*, 367 U.S. at 490 (discussing state establishments and the "consequent burdens" they "imposed on the free exercise of * * * nonfavored believers"). In other words, Virginia did not have an established church because it persecuted Baptists and excluded Quakers; it had an established church because it erected Anglican "churches * * * in every parish at public expense," selected the Anglican Church's ministers, and resolved theological matters by statute. McConnell, 44 Wm. & Mary L. Rev. at 2118-19.

Thus in both Virginia and Massachusetts it was not disestablishment that ended the regimes of excluding and suppressing dissenters—it was the enactment of free exercise provisions. McConnell, 44

Wm. & Mary L. Rev. at 2119-20 (the free exercise provision of the Virginia Declaration of Rights "effectively ended the persecution of Baptist and other preachers and granted all Virginians the right to practice religion freely" "[b]ut it did not disestablish the Church"); *id.* at 2123-26 (provision of the Massachusetts Charter of 1691 guaranteeing "liberty of Conscience * * * to all Christians" "eased" attempts "to maintain religious homogeneity by banishing or punishing dissenters," although the Massachusetts establishment did not end until 1833).

This dynamic repeated itself in the context of "Blaine Amendments"—state constitutional provisions, enacted largely in the late 19th century, that restricted public funding for "religious" or "sectarian" institutions. See Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 493-95, 516-23 (2003). As many Justices of this Court have recognized, Blaine Amendments were "bigot[ed]" measures, *Mitchell* v. *Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.), designed to prevent the funding of Catholic schools so as to "preserve the[ ] domination" of the public schools, which at the time were generically "Protestant in character." *Zelman*, 536 U.S. at 717-23 (2002) (Breyer, J., joined by Stevens and Souter, JJ., dissenting) (citing Philip Hamburger, Separation of Church and State 219, 287 (2002)). Thus, like the earlier efforts to suppress dissent in Virginia and Massachusetts, Blaine Amendments used discrimination against a religious minority as a means to *support* an otherwise existing state establishment—namely, the de facto "establishment of

Protestantism" effected through the public school system. Hamburger at 219-229; see also Philip Hamburger, *Prejudice and the Blaine Amendments*, FIRST THINGS (June 20, 2017), https://goo.gl/Ewq7Pn.

Nonetheless, because laws like Blaine Amendments did not themselves favor or control any particular church but instead "target[ed] the religious for special disabilities based on their religious status," the Court has held that these laws are constitutionally "limited" not by the Establishment Clause, but "by the Free Exercise Clause." *Trinity Lutheran*, 137 S. Ct. at 2019, 2024 (internal quotation marks and citation omitted).

This history demonstrates that restrictions on religious minorities have consistently been addressed under free exercise provisions even when the restrictions were used to prop up an established church. But it is even clearer that when "restrictions on minority faiths are [*not*] part of any effort to establish some other religion, * * * such restrictions are * * * treated as a free exercise issue." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1800 (2006); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1382 (1981) (when "a restriction on one or a few religions" is unconnected from any overarching "policy of establishing the preferred religions," the Free Exercise Clause, and not the Establishment Clause, provides the correct analysis). Put simply, government disfavor toward one religion does not—

standing alone—establish another. But it does potentially violate free exercise.

Lukumi proves this point. In *Lukumi*, all nine Justices agreed that the City of Hialeah had singled out a particular religion for disfavored treatment: it passed an ordinance prohibiting the "central element of the * * * worship service" of the Santería religion, and did so in order to "target[]" Santería. 508 U.S. at 534, 541-42. But the Court declined to rely on the Establishment Clause. Surveying precedent under both Religion Clauses, the Court noted that Establishment Clause cases "for the most part have addressed governmental efforts to benefit religion or particular religions," rather than the sort of "attempt to disfavor [a] religion" at issue there. 508 U.S. at 532. The Court therefore held that "the Free Exercise Clause [would be] dispositive in [its] analysis." *Ibid.*; see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 698 (1994) (plurality op. of Souter, J.) (applying Establishment Clause where religious group vested with civic power but noting that if the group had instead been "*denied*" "the rights of citizens simply because of [its] religious affiliations," that would be a "free exercise" case (emphasis added)).

On the theory urged by Respondents (and adopted by the Fourth Circuit in *IRAP*), *Lukumi* should have been an Establishment Clause case—the ordinance "established a disfavored religion," Santería. See, *e.g.*, *Hawaii* v. *Trump*, 241 F. Supp. 3d 1119, 1126 (D. Haw. 2017) (characterizing challengers' claim as being that "the Government has established a disfavored religion," Islam). But, again, *Lukumi* was self-consciously *not* an Establishment Clause case—and

for good reason, because the notion of an "establishment" of a disfavored religion is both a historical and a logical non sequitur.

Nonetheless, the plaintiffs, the Government, and the lower courts can't help themselves: they have repeatedly cited *Lukumi* and other Free Exercise cases in this litigation, underscoring that Respondents' claim is really a Free Exercise claim in disguise. When EO-2 was before this Court, Respondents' merits briefs cited *Lukumi* repeatedly, yet they failed to cite *Lemon*—the Establishment Clause case under which they ostensibly *won* in the lower courts—even once. Br. of Respondents, *Trump* v. *Hawaii*, No. 16-1540 (Sept. 11, 2017); Br. of Respondents, *Trump* v. *Int'l Refugee Assistance Project*, No. 16-1436 (Sept. 11, 2017). Here, the Government's opening brief, cites *Lukumi*, for the odd notion that if a law's operation is neutral, then *Lemon*'s purpose prong cannot be met. Gov't Br. 65.[5] And in *IRAP*, the Fourth Circuit, in addition to relying on *Lukumi*, quoted *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986), for the proposition that even "covert suppression of particular religious be-

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[5] This approach gets *Lukumi* triply wrong: First, as we demonstrate in section I above, *Lemon* is the wrong place to start with Establishment Clause analysis; using the historically-rooted *Lukumi* to rehabilitate the utterly ahistorical *Lemon* test is perverse. Second, *Lukumi* expressly disclaims any relation to the Establishment Clause. 508 U.S. at 532. Third, *Lukumi* holds that a law's mere operation—with or without animus—is sufficient to *prove* a violation of the *Free Exercise Clause*; it does not create a method to *disprove* a violation of the *Establishment Clause*.

liefs" is presumptively unconstitutional, 2018 WL 894413, at *6—overlooking that *Bowen* is a Free Exercise case that in the very next paragraph explains that "historical instances of religious persecution and intolerance" were addressed by "the Free Exercise Clause of the First Amendment." *Bowen*, 476 S. Ct. at 703-04.

Other *amici*, too, note that it is "conceptually awkward" to conceive of the Proclamation as an Establishment Clause violation, given that the alleged "targeting of the individual and associational Respondents because they are Muslim" does not in itself have "the consequential effect of establishing * * * other religions." Br. of Christian Legal Society and National Association of Evangelicals ("CLS Br.") at 17-18. True—but this makes Respondents' theory not just "awkward," but *legally wrong*. At least in a religiously pluralistic society like ours, a standalone law disfavoring Religion A does not thereby tend to establish any other Religion B, C, or D. Laycock, 81 Colum. L. Rev. at 1382 (in modern context it is "silly" to argue that "a restriction on one or a few religions * * * establish[es] all the others"). Indeed, to hold otherwise would be to have "the establishment clause * * * swallow the free exercise clause," rendering superfluous the doctrinal distinctions between the two Clauses that this Court has long articulated and applied. *Id.* at 1380; see also *infra* section II.C (explaining these differences).[6]

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[6] In leaving the door open for the Proclamation to potentially constitute an Establishment Clause violation, the CLS *amici*

Fortunately, in *Lukumi*, this Court already got the division of labor between the two Religion Clauses right. The historical establishments prohibited by the Establishment Clause were designed to establish—to bring within state protection or control—certain religions or religious ideas, not just to target one of many religions for disfavored treatment. Eliminating claimed religious targeting is the job of the Free Exercise Clause.

B. *Lukumi* provides the proper framework for using the Free Exercise Clause to combat claimed religious targeting.

Not only is the Free Exercise Clause the right Clause for this case historically and doctrinally—it is

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note that measures short of "setting up a full-fledged national church" can violate the Establishment Clause. CLS Br. at 19. We agree; as explained above, founding-era establishments included a number of different features that could potentially violate the Establishment Clause. See Section I.B *supra*; see also *Hosanna-Tabor*, 565 U.S. at 181-85. But what all these features—and all the examples offered by the CLS *amici*, see CLS Br. at 19—have in common is that they constitute efforts to support or control certain religions or religious ideas, not just standalone efforts to disfavor other religions or religious ideas. That is precisely why this case is distinct.

CLS *amici* also point out that a violation of one Religion Clause does not preclude violation of another. *Id.* at 10 n.13. We could hardly disagree; cf. *Hosanna-Tabor*, 565 U.S. at 181 (both Clauses violated). The problem for Respondents' Establishment Clause claim is not that Religion Clause claims are mutually exclusive but that, under *Town of Greece*'s historical approach, their Establishment Clause claim fails on the merits. See Section I.B. *supra*.

also the Clause best suited to combat the sort of religious targeting alleged here.

The key question in this case is whether a law that is facially neutral with respect to religion in fact embodies hostility toward one particular religion, targeting it for disfavored treatment. See *IRAP*, 2018 WL 894413 at *14; see also *id.* at *101 (Niemeyer, J., dissenting) (Proclamation is "concededly neutral on its face"). That is a question Free Exercise doctrine is well equipped to answer. Because the Free Exercise Clause prohibits, among other things, lawmakers from "devis[ing] mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices," the *Lukumi* Court identified "many ways" that a plaintiff can demonstrate that a facially neutral law in fact constitutes "covert suppression of particular religious beliefs" or a "subtle departure[] from" religious neutrality. 508 U.S. at 533-34, 547 (internal quotation marks and citation omitted); see also *id.* at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."); *Trinity Lutheran*, 137 S. Ct. at 2021 (in *Lukumi*, "despite their facial neutrality, the ordinances had a discriminatory purpose easy to ferret out"). These carefully calibrated techniques for uncovering "masked," "covert," or "disguised" hostility toward religion stand in stark contrast to the ineffective *Lemon* test, which focuses on inherently subjective perceptions of the lawmaker's intent. See *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 675-76 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (*Lemon* test requires courts to "[d]ecid[e] cases on the basis of

* * * an unguided examination of marginalia" using "little more than intuition and a tape measure.").[7]

In contrast, *Lukumi* illustrates at least seven ways a plaintiff can prove that a law is not "neutral and of general applicability" with respect to religion under the Free Exercise Clause. See *Lukumi*, 508 U.S. at 531-32 (citing *Emp't Div.* v. *Smith*, 494 U.S. 872 (1990)). This elaboration of neutrality and general applicability, not the *Lemon* test, should determine the constitutionality of the Proclamation here. The Court should therefore reject Respondents' Establishment Clause claim and remand so that Respondents can litigate their Free Exercise claim in the first instance, and so that the lower courts can consider whether any of the following paths to strict scrutiny is satisfied.

1. Does the law facially target religion?

First, a plaintiff can show that a law is not neutral and generally applicable by showing that the law facially targets religion. "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. Thus if a law's benefits or burdens are determined by "refer[ence] to a religious practice without a secular meaning discernable from the language or context," the law is not

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[7] Of course, while the gravamen of Plaintiffs' claim is that the Proclamation is the result of anti-Muslim animus, "the Free Exercise Clause is not confined to actions based on animus," *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.); and *Lukumi* illustrates many ways that a plaintiff can get to strict scrutiny without showing animus.

neutral and generally applicable under the Free Exercise Clause, and strict scrutiny applies. *Id.* at 533-34.

2. Does the law, in its real operation, result in a religious gerrymander?

Facial neutrality is the "minimum," but strict scrutiny applies even to facially neutral laws if "the effect of [the] law in its real operation" is to accomplish "a religious gerrymander." *Lukumi*, 508 U.S. at 535 (internal quotations marks and citation omitted). A gerrymander exists when a law—evaluated in light of its stated, nondiscriminatory purpose—is so underinclusive with respect to secular conduct, and so overinclusive with respect to religious conduct, that its "burden * * *, in practical terms, falls on [a particular religion's] adherents, but almost no others." *Id.* at 534-37.

3. Does the law fail to apply to analogous secular conduct?

Short of a gerrymander, another way a plaintiff can prove a Free Exercise violation is to show that the law's "prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). Thus, in *Lukumi*, the law at issue was not neutral and generally applicable because it exempted animal killing for certain secular reasons, but not religious reasons, even though secular killings would endanger the government's purported interests in protecting public health and preventing animal cruelty just as much as or more than religious

sacrifices. 508 U.S. at 533-34. The categorical-exemption inquiry is designed to prevent the government from making "a value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

4. Does the law give the government open-ended discretion to make individualized exemptions?

Another way to show that a law is not neutral and generally applicable is to show that it gives the government open-ended discretion to make "individualized exemptions." *Lukumi*, 508 U.S. at 537. Individualized exemptions trigger strict scrutiny if they are capable of being "applied in practice in a way that discriminates against religiously motivated conduct," relative to secular conduct equally undermining the government's stated interests. See *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884).

5. Has the law been selectively enforced?

Even a law that is neutral and generally applicable on its face can violate the Free Exercise Clause if the plaintiff shows that it has "been enforced in a discriminatory manner." *Blackhawk*, 381 F.3d at 208. This is because "selective * * * application" of a facially neutral and generally applicable law "devalues" religious reasons for engaging in conduct just as much as a law that facially exempts analogous secular conduct. *Tenafly Eruv Ass'n, Inc.* v. *The Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002).

6. Does the law's historical background show that the lawmaker's purpose was to discriminate based on religion?

If a law by its terms is neutral and generally applicable and there is no evidence of selective enforcement, it could still trigger strict scrutiny if its "historical background"—including "statements made by members of the decisionmaking body"—indicates a purpose to discriminate based on religion. *Lukumi*, 508 U.S. at 540-42 (opinion of Kennedy, J., joined by Stevens, J.). The contours of this inquiry, however, are contested. Only two Justices agreed in *Lukumi* that this type of evidence could be significant, and two other Justices disagreed, arguing that the "evil motive[] of [a law's] authors" is irrelevant. Compare *ibid.* (plurality opinion) with *id.* at 558-59 (Scalia, J., joined by Rehnquist, C.J., concurring).

7. Does the law discriminate between religions?

Finally, laws that discriminate *between* religions, rather than just between religion and nonreligion, also violate the Free Exercise Clause. *Lukumi*, 508 U.S. at 536 (citing *Larson* v. *Valente*, 456 U.S. 228, 244-46 (1982)); *Smith*, 494 U.S. at 877 (same). Thus, in applying the other six categories of the *Lukumi* analysis, if a law's text, "object," exemptions, or (possibly) motive demonstrate a preference for conduct by members of some religions over others, rather than for secular conduct over religious conduct, the law nonetheless triggers strict scrutiny. *Larson*, 456 U.S.

at 245-47 (describing this as a rule against "denominational preferences").[8]

C. Because Free Exercise claims are usually subject to strict scrutiny and relief is plaintiff-specific, the choice of Clause matters.

The lower courts' reliance on the Establishment Clause rather than the Free Exercise Clause has created important problems concerning the balancing of interests and the scope of relief. First, by relying solely on the Establishment Clause, the Fourth Circuit, like other lower courts in the cases challenging EO-1 and EO-2, decided an important issue with potentially serious implications for national security without putting the government's claimed interests into the balance. Second, the scope of the remedy the Fourth Circuit granted—invalidation of the Proclamation as against six of the eight covered countries—was far broader than necessary to provide relief to the specific plaintiffs before the courts.

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[8] Although *Larson* invokes both the Establishment Clause and the Free Exercise Clause, this Court's decisions in *Smith* and *Lukumi* treat *Larson* as essentially Free Exercise precedent. See *Lukumi*, 508 U.S. at 536; *Smith*, 494 U.S. at 877; accord *Larson*, 456 U.S. at 245 ("Th[e] prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); see also *id.* at 255 (characterizing the law at issue as "religious gerrymandering"). That treatment is consistent with *Larson*'s application of strict scrutiny, 456 U.S. at 246-51—an analysis that typically occurs under the Free Exercise Clause, not the Establishment Clause. See *infra* section II.C.

The first practical problem derives from another key difference between the Establishment and Free Exercise Clauses: the extent to which each Clause accounts for the strength of the government's interest in enacting the challenged law. The Establishment Clause is a structural limitation on government power, so "Establishment Clause violations * * * are usually flatly forbidden without reference to the strength of governmental purposes." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (McConnell, J.) (collecting cases). But Free Exercise claims generally *are* subject to an interest-balancing test—strict scrutiny. Under the Free Exercise Clause, once a law burdening religious exercise is determined not to be neutral or generally applicable, it still passes constitutional muster if government meets its burden to demonstrate that the law in question "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (internal quotation marks and citations omitted).[9]

Strict scrutiny plays an important role in Free Exercise analysis. To be sure, it is a demanding test;

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[9] There is an exception for laws "targeting religious beliefs as such," which are "never permissible." *Trinity Lutheran*, 137 S. Ct. at 2024 n.4 (quoting *Lukumi*, 508 U.S. at 533). This distinction goes all the way back to *Cantwell* v. *Connecticut*: "the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." 310 U.S. 296, 303-4 (1940). The government cannot bring a strict scrutiny affirmative defense to the "absolute" claims.

when applied correctly, it is the "rare" law that survives it. *Lukumi*, 508 U.S. at 546. But strict scrutiny at least leaves open the possibility for courts to strike "appropriate[] balance[s]" between free exercise and serious government needs—balances that can account for "context" and "sensitivity to security concerns" when necessary. *Cutter* v. *Wilkinson*, 544 U.S. 709, 722-23 (2005).

Because the cases challenging the Proclamation and its predecessor Executive Orders have thus far been litigated as Establishment Clause cases rather than Free Exercise cases, the lower courts have failed to analyze the Proclamation under strict (or any other level of) scrutiny. Instead, courts have held the Proclamation likely unconstitutional and enjoined it immediately upon concluding that it violated *Lemon*'s purpose prong. *IRAP*, 2018 WL 894413, at *17; see also *Hawaii*, 241 F. Supp. 3d at 1138 (interest balancing not "necessary to the Court's Establishment Clause determination"); *Aziz* v. *Trump*, 234 F. Supp. 3d 724, 735 (E.D. Va. 2017) (Establishment Clause concerns "do not involve an assessment of the merits of the president's national security judgment."). This is error. As explained above, the Proclamation does not violate the Establishment Clause, and under the more appropriate Free Exercise Clause analysis, courts should analyze whether the order is neutral and generally applicable and then, if appropriate, apply strict scrutiny to determine its constitutionality.

The failure to apply strict scrutiny provides yet another illustration of how *Lemon* is problematic. With no interest balancing, *Lemon*'s purpose prong renders any law that targets religion unconstitution-

al. *IRAP*, 2018 WL 894413, at *14, *17; see also *Hawaii*, 241 F. Supp. 3d at 1134-39; *Aziz*, 234 F. Supp. 3d at 733-37. But that is flatly inconsistent with *Lukumi*, which holds that a showing of religious discrimination is not the end of the analysis, but just one way among many to trigger strict scrutiny. *Lukumi*, 508 U.S. at 533 (a non-neutral law is "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.").

The second practical problem with following *Lemon* rather than *Lukumi* here is that the scope of the remedies granted—in *IRAP*, nationwide injunctions against carrying out the Proclamation, at least with respect to the six majority-Muslim countries covered by it—are far broader than necessary to provide relief to the plaintiffs. As we noted above, the natural result of a successful Establishment Clause claim is invalidation of the challenged provision, because the Establishment Clause acts as a structural constraint on government power, like the doctrine of separation of powers.

But at issue here is something more like a typical civil rights claim, where individuals and institutions allege that they need relief from the application of a particular government policy to their specific circumstances. The Free Exercise Clause, which allows for remedies tailored to the specific plaintiffs before the Court, is far better suited to resolving this sort of dispute than the relatively inflexible Establishment Clause. That outcome would also reduce the scope of church-state conflict by restricting the footprint of the remedy to only what is necessary to provide relief to the specific plaintiffs before the courts.

D. A proper Free Exercise analysis would focus on the facts concerning specific plaintiffs.

On remand, Respondents should be given an opportunity to develop the Free Exercise claim they raised in their complaint.

A proper Free Exercise analysis in the lower courts should focus on how the Proclamation applies to the specific circumstances of the specific plaintiffs before the court. That is because religious liberty claims are best decided, and typically decided, on a retail rather than wholesale basis. The reason lies with the nature of Free Exercise claims, which must be rooted in religious conscience in order to be valid. In contrast to Free Speech claims, where the First Amendment protects the "marketplace of ideas," *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017), the Free Exercise Clause protects religious conscience as it manifests itself in public or in private. That is why a Free Exercise plaintiff must prove sincerity, while a Free Speech plaintiff need not. That is also why in making out her claim a Free Exercise plaintiff must explain the nature and religiosity of her beliefs. "[P]hilosophical and personal rather than religious" beliefs are not enough. *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972). The plaintiff's contested actions or omissions must be manifestations of a sincere religious belief. And because a Free Exercise plaintiff must prove up both sincerity and the specific nature of her religious beliefs and practices, it is difficult for courts to decide Free Exercise claims in gross.

This retail focus is true as well of the government's strict scrutiny affirmative defense. As the

Court put it in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), strict scrutiny under the Free Exercise Clause is evaluated "through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." 546 U.S at 430-31 (citation omitted). "In [*Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Yoder*], this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Ibid.*

Given this fact-specific, "to the person" approach, on remand Respondents should establish, and the lower courts should determine, the factual circumstances of both the nature and sincerity of Respondents' claims, as well as the specific justifications the government has for applying the Proclamation to the "particular claimant[s]" who can make out a proper showing of burden on a sincere religious exercise. *O Centro*, 546 U.S. at 430-31. This would not include Respondent Hawaii, which has no religion to exercise. See, *e.g.*, *Yoder*, 406 U.S. at 215 (Free Exercise Clause protects only claims "rooted in religious belief"). But the individual and associational Respondents, who have alleged that they are Muslim and that the Proclamation has burdened their religious exercise, should be given the opportunity to develop these claims.

For example, the individual and associational Respondents may make out a claim, based on their specific circumstances, that their religious exercise has been burdened by a regulatory system "in which individualized exemptions from a general requirement

are available." *Lukumi*, 508 U.S. at 537. In such a situation, "the government 'may not refuse to extend that system to cases of religious hardship without compelling reason.'" *Ibid.* (quoting *Smith*, 494 U.S. at 884). If Respondents can identify a specific religious exercise that the government has burdened, and show that the Proclamation's provisions permitting "exceptions and case-by-case waivers," Gov't Br. 10, constitutes a system of individualized exemptions that excludes waivers for religious hardship under *Lukumi*, they will have made out their *prima facie* case under the Free Exercise Clause. Then the burden would shift to the government to demonstrate, with respect to the specific plaintiffs involved, that it has a compelling interest in imposing a burden on the religious exercise(s) identified by those plaintiffs.

Yet no one has had a chance to engage in this sensible fact-specific and plaintiff-specific approach because the lower courts have followed the failed *Lemon* test rather than the proven *Lukumi* analysis. "Like some ghoul in a late-night horror movie," *Lemon* continues to sow confusion in the lower courts, despite "being repeatedly killed and buried" by this Court. *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). The Court should resolve the confusion, and make clear that *Lukumi*, rather than *Lemon*, controls religious-targeting claims like this one.

* * *

It is said that bad facts make bad law. But bad law can make bad law too. Taking the *Lemon* path rather than the *Lukumi* path in this case would guarantee the further proliferation of bad law. And

bad law is what many refugees are trying to escape from. The Court can set this extremely important litigation on a better foundation by directing the lower courts to use the Free Exercise Clause to balance the weighty societal interests at stake.

CONCLUSION

The decisions below should be vacated and remanded with instructions to consider Respondents' Free Exercise claims.

Respectfully submitted.

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